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Supreme Court, U.S.
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No. ___

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

ROY T. RIMMER, JR.,

Petitioner,

v.

OCTAGON GAS SYSTEMS, INC.,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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October 6, 1993

QUESTIONS PRESENTED

1. Under § 541(a)(1) and § 541(d) of the Bankruptcy Code, can a debtor's bankruptcy estate include equitable interests in property that the debtor did not have at the time of filing the bankruptcy petition?

2. What aspect of state law should federal courts apply in determining whether the transfer of an account is a sale or a security interest for the purposes of defining the bankruptcy estate under § 541?

RULE 29.1 NOTATION

Pursuant to Rule 29.1, the Court is advised that the Petitioner is not a corporation, and, as a result, does not have any parent corporation or subsidiaries that are not wholly-owned.

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OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Tenth Circuit, dated May 27, 1993, is reported at 995 F.2d 948 and is reproduced at pages 1a through 23a of the Appendix to this Petition ("Pet. App."). The Order of the United States District Court for the Western District of Oklahoma, dated January 22, 1992, is unreported and is reproduced at Pet. App. 24a through 26a. The Order of the Bankruptcy Court for the United States District Court for the Western District of Oklahoma, dated July 29, 1991, is unreported and is reproduced at Pet. App. 27a through 34a. The Order of the United States Court of Appeals for the Tenth Circuit denying rehearing, dated July 8, 1993, is not yet reported and is reproduced at Pet. App. 35a.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1993. The Court of Appeals denied a timely petition for rehearing on July 8, 1993. Pet. App. 35a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

§ 541 of the Bankruptcy Code of 1978, as amended (the "Bankruptcy Code"), 11 U.S.C. § 541, provides in pertinent part as follows:

> (a) The commencement of a case under § 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:
>
> (1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.
>
> * * * *
>
> (d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

STATEMENT OF THE CASE

This is an adversary proceeding in bankruptcy brought to determine the bankruptcy estate's interest in an account sold by the debtor to an independent third party prior to bankruptcy. The bankruptcy court below ruled that the account at issue was not part of the bankruptcy estate because the account was sold, and therefore, the debtor retained no interest in it. Pet. App. 34a. The district court affirmed the bankruptcy court. Pet. App. 25a. Over a strong dissent, the court of appeals held that under Oklahoma's version of Article 9 of the Uniform Commercial Code ("Article 9"), Okla. Stat. Ann. tit. 12A, §§ 9-101 to 9-507) there could be no transfer of an ownership interest in an account, despite any indicia of a sale of an ownership interest, because under Section 102 of Article 9, even a *bona fide* sale of such an account is deemed to create at most a secured loan. Pet. App. 10a-11a. As a result, the court of appeals concluded that the account constituted part of the bankruptcy estate, and remanded the case to the bankruptcy court to determine whether in buying an interest, the account at issue had been perfected under Article 9. Pet. App. 17a.

The debtor in this case, Poll Gas, Inc. ("Poll"), was in the business of selling natural gas and liquids collected through its gas gathering system (the "System"). In 1976 and 1982, Poll assigned interests in the System's proceeds to six different parties. In 1983 and 1984, Roy T. Rimmer purchased a portion of these interests from the original assignees in exchange for over $500,000 in cash and transfer of his title to a pipeline. In 1987, Poll and Mr. Rimmer entered into an agreement entitled "Assignment of Overriding Royalty Interest" (the "1987 Assignment") under which Mr. Rimmer exchanged a portion of the interests he purchased from the original assignees in

return for shares of stock and a five percent perpetual interest in the System's proceeds. The 1987 Assignment expressly provided that Mr. Rimmer "will own from this day forward a full Five Percent (5%) perpetual overriding royalty interest on all proceeds payable to [Poll] under the [System]." Pet. App. 2a-3a.

In October of 1988, Poll and certain related corporations filed petitions for reorganization under Chapter 11 of the Bankruptcy Code and, several months later, a trustee was appointed to administer the bankruptcy estate of these companies. In January of 1990, the bankruptcy court confirmed the trustee's plan of reorganization (the "Plan"). The primary transaction contemplated by the Plan was the conveyance of the System to Norwest Bank Minnesota ("Norwest") or its designee in satisfaction of Norwest's secured claim held against Poll. In January of 1990, Poll's bankruptcy trustee executed assignments conveying the System to the Respondent, Octagon Gas Systems, Inc. ("Octagon") as Norwest's designee. Pet. App. 3a-4a.

Poll had always made payments to Mr. Rimmer in accordance with the 1987 Assignment, and during the pendency of the bankruptcy, the trustee continued to make those payments. The documents by which the System was transferred to Octagon excluded Rimmer's interests from the assets so conveyed. After the assignments to Octagon, however, Octagon refused to recognize Mr. Rimmer's interest in the System's proceeds and refused to make payments thereon. As a result, Bonnet Resources Corporation, one of Mr. Rimmer's creditors that claimed a security interest in Mr. Rimmer's interest in the System's proceeds, initiated this adversary proceeding in bankruptcy court to determine whether the Plan transferred that interest to Octagon. Pet. App. 3a. Mr. Rimmer then brought a motion for intervention,

which was granted. The post-confirmation trustee appointed pursuant to the Plan expressly disclaimed any interest in Mr. Rimmer's interest. On cross motions for summary judgment, the bankruptcy court held that Mr. Rimmer's interest in the System's proceeds was not affected by the Plan or the transfer of the System to Octagon because Poll no longer had any interest in that property. Pet. App. at 34a.

In so holding, the bankruptcy court expressly rejected Octagon's argument that Article 9 rendered Mr. Rimmer's interest in the System's proceeds property of Poll's bankruptcy estate and reduced Mr. Rimmer's status to that of an unsecured creditor. The bankruptcy court held that Article 9 was inapplicable because Mr. Rimmer's interest was an ownership interest. The Bankruptcy Court reasoned that the purpose of Article 9 is to classify parties' interests for the purposes of determining the rights of competing security interests, and was not a classification relating to ownership rights. Pet. App. 34a. The United States District Court for the Western District of Oklahoma summarily affirmed the bankruptcy court's decision. Pet App. 24a-26a.

A divided Tenth Circuit panel reversed. The court of appeals began by holding that Mr. Rimmer's interest in the System's proceeds constituted an account under Article 9. Pet. App. 8a-10a. Looking solely to § 102 of Article 9, the court then held that for purposes of Section 541 of the Bankruptcy Code ("§ 541") the sale of an account is always deemed a secured loan from the buyer to the seller with the account standing as collateral, when the underlying transaction is not intended to secure a debt and has all the indicia of a true sale. Pet. App. 10a-11a. Moreover, unless the buyer of an account has publicized (*i.e.* "perfected") his interest in the account in accordance with Article 9, a

bankruptcy trustee can avoid the buyer's interest upon bankruptcy and reduce the buyer's status to that of an unsecured creditor. Pet. App. 11a-12a.

In reaching its conclusion, the Tenth Circuit rejected Mr. Rimmer's argument that his purchase of the account in a *bona fide* sale deprived Poll of any ownership interest in the account that could have become property of Poll's bankruptcy estate. The Tenth Circuit ignored Mr. Rimmer's argument that Article 9 did not require his interest to be perfected and that the issue of perfection was mooted by the Trustee's failure to avoid Mr. Rimmer's interest within the applicable statute of limitations. Thus, the net effect of the Tenth Circuit's decision is that interests that qualify as "accounts" under Article 9 cannot be sold for the purposes of § 541; regardless of whether Article 9's perfection requirements have been met and regardless of the *bona fide* character of the sale, the seller always retains ownership rights in the account which upon bankruptcy become part of the seller's bankruptcy estate. The court of appeals remanded the case to determine whether Mr. Rimmer had actually publicized his interest in accordance with Article 9. Pet App. 17a.

Judge Seth lodged a vigorous dissent, arguing that Mr. Rimmer's interest in the System's proceeds was not property of Poll's bankruptcy estate because the ownership interest in such proceeds had been transferred to Mr. Rimmer. Judge Seth argued:

> The position taken by the majority is that the interest of Mr. Rimmer was put in the Poll bankruptcy estate by Article 9 of the U.C.C. This position is based only on the theory that the interest fell within the Article 9 definition of "account," and if it was an "account" it automatically was included in the Debtor's estate.

> This was, according to the majority, to follow regardless of the intention of the parties . . . and the years of "course of dealing."

Pet. App. 22a. Judge Seth argued that the very consequences of the applying Article 9 demonstrated that the majority's rule was misplaced in the context of a sale. He concluded that he would have affirmed the trial court's decision. Pet. App. 23a.

REASONS FOR GRANTING THE WRIT

The Tenth Circuit's decision has adversely affected the operation of capital markets inside the Tenth Circuit and may cause further repercussions throughout the country. The decision below merits review because it conflicts with rulings from other courts of appeals on two issues of national significance in federal bankruptcy law where certainty and national uniformity are critical. The Tenth Circuit's rule has the effect of giving a debtor greater property rights in bankruptcy than he or she had before filing the bankruptcy petition and, as a result, the opinion below is contrary to the plain language of § 541 of the Bankruptcy Code and creates a conflict among the courts of appeals. There is now a mature conflict among the decisions of the courts of appeal on this important national issues. The practical effect of the Tenth Circuit's decision is to render asset-backed financing, which has been described as one of the principal means of forming capital in the country, useless in the states within the Tenth Circuit.[1] The decision below also conflicts with a decision from the Ninth Circuit that looked to several provisions of the relevant state Uniform Commercial Code and state contract law to determine the status of a transferred account for

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[1]See e.g., Investment Company Act Release No. 19105, [1992 Transfer Binder] Fed. Sec. L. Rep. CCH ¶ 85,062 at 83,500 (November 19, 1992).

purposes of defining the bankruptcy estate. By announcing a new and different standard for determining the status of an account for the purposes of defining the bankruptcy estate, the Tenth Circuit has created a disparity in the rights of debtors filing petitions within the boundaries of that circuit vis-a-vis debtors filing bankruptcy petitions in other circuits.

I. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS OVER WHETHER § 541(a)(1) AND § 541(d) OF THE BANKRUPTCY CODE ALLOW THE BANKRUPTCY ESTATE TO INCLUDE EQUITABLE INTERESTS THAT THE DEBTOR DID NOT OWN AT THE TIME OF FILING THE PETITION

This case calls upon the Court to determine whether § 541(a)(1) and § 541(d) allow an equitable interest in property to be included in the bankruptcy estate if the debtor did not own that equitable interest at the time the bankruptcy petition was filed. The result of the opinion below is contrary to both the plain language of § 541 and the decision of another court of appeals.

A. The Tenth Circuit's Decision Enlarges the Bankruptcy Estate More Than the Plain Language of § 541 Permits

The plain language and legislative history of § 541 demonstrate that the Tenth Circuit's decision expands the scope of a debtor's bankruptcy estate extends beyond what Congress intended. Section 541(a)(1) provides that the bankruptcy "estate is comprised of all legal or equitable interests of the debtor in property as of the commencement of the case" 11 U.S.C. § 541(a)(1). Section 541(d) provides that: "[p]roperty in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest. . . becomes property of the estate under subsection (a) of this

section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold." 11 U.S.C. § 541. The plain language of subsections (a)(1) and (d) of Section 541 establish that the bankruptcy trustee cannot take greater equitable rights in property than the debtor had on the date of filing. *See also* 4 *Collier on Bankruptcy* § 541.01 at 541-6 (15th ed. 1983); S. Rep. No. 989, 95th Cong. 2d Sess. (1978) and H.R. Rep. No. 595, 95th Cong. 1st Sess. (1977) *reprinted in* 978 U.S.C.C.A.N. 5787, 5868, 6324 (§ 541 (a)(1) "is not intended to expand the debtor's rights against others more than they exist at the commencement of the case"); *United States v. Whiting Pools, Inc.*, 462 U.S. 205, n.9 (1983). By relying on § 102 of Article 9 to define any sale of an account as always being a secured loan for the purposes of § 541, the Tenth Circuit decision transgresses Congressional intent as reflected in § 541 by allowing property to which a debtor no longer has any equitable interest to be included in a debtor's bankruptcy estate.

B. The Tenth Circuit's Decision Gives the Bankruptcy Estate an Equitable Interest That the Debtor Did Not Have at the Time of Filing Thereby Creating a Conflict Among the Courts of Appeals

The effect of the decision below, which provides the bankruptcy estate with an equitable interest in an account that the debtor did not have before filing directly conflicts with a decision in the Eighth Circuit. A panel of the Eighth Circuit held that the bankruptcy estate could not have an equitable interest in an escrow account that the debtor did not own at the time of filing.[2] *Garrott & Sons v. Union*

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[2]While the Court and the other courts of appeal have not adopted the rule announced by the Eighth Circuit, many of these courts have

Planters National Bank (In re N.S. Garrot & Sons), 772 F.2d 462 (8th Cir. 1985).

The escrow account at issue in the Eighth Circuit's decision had been established by an escrow agreement under which the debtors had paid a lump sum into an escrow account (the "Escrow Account") that would then make payments due on two mortgages. The debtors retained rights to excess interest and to make limited investment advice with regards to the funds in the Escrow Account. The debtors later filed Chapter 11 petitions in bankruptcy and filed a complaint for turn over against the bank holding the Escrow Account. The bankruptcy court ordered the bank to turn over the entire account to be

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at least noted in dicta that § 541 does not create property rights in the estate greater than the debtor possessed at the time of filing the petition. *See, United States v. Whiting Pools Inc.*, 462 U.S. 198, 205 n. 10 ("Congress plainly excluded property of others held in trust [by the debtor] at the time of filing the petition."); *Drabkin v. Midland-Ross Corp. (In re Auto-Train Corp. Inc.)*, 810 F.2d 270, 273 (D.C. Cir. 1987) ("The estate comprises no greater interest rights than the debtor had on the date of filing"); *S.E.C. v. Cayman Islands Reinsurance Corp. (In re Brown)*, 734 F.2d 119, 124 (2d Cir. 1984) ("[T]he bankruptcy estate can have no greater interest in property included in it than the debtor had when the petition was filed."); *Vineyard v. McKenzie (In re Quality Holstein Leasing)*, 752 F.2d 1009 (5th Cir. 1985) ("Although those powers [§ 544 of the Bankruptcy Code] allow a trustee to assert rights that the debtor itself could not claim to property, Congress did not mean to authorize a bankruptcy estate to benefit from property that the debtor did not own"). *See also Dannerbeck v. Palmer*, 502 F.2d 686 (9th Cir. 1974) ("Since the contract proceeds were thus effectively assigned to Palmer, then on the date of bankruptcy Horner Excavating had no property interest in the proceeds which could vest in the trustee pursuant to section 70(a) of the Bankruptcy Act."); and *Levin v. City Trust Co. (In re Joseph Kanner Hat Co.)*, 482 F.2d 937 (2d Cir. 1973).

included in the debtors' estates, and the district court affirmed. On appeal the Eighth Circuit held that under relevant state law, a constructive trust had been created under the escrow agreement, and therefore the debtors did not have all the equitable interest in the Escrow Account. "Since the estate cannot acquire greater interests than those which the debtor had, we conclude that the estate holds the main fund, apart from excess interest, in trust, subject to the equitable interests of others. As such the bankruptcy court is bound to recognize those equitable interests." *Id.* at 467. The Eighth Circuit affirmed the turnover, but directed the district court first to pay off the related mortgage loans and then after such payments had been made, treat remaining amounts from the Escrow Account as part of the bankruptcy estate.

C. The Tenth Circuit's Decision Will Curtail the Benefits of a Widespread and Economically Beneficial Financing Technique

The negative national economic impact of the Tenth Circuit's decision is clear. Secondary literature denouncing the Tenth Circuit's decision and its detrimental effect on the field of finance is plentiful and mounting.[3] The widely used

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[3]*See* Rocks and Weinberger, *New Bankruptcy Risk for Receivable Buyers,* X The Bankruptcy Strategist No. 11, 1, 6 (September 1993) ("[A]t least two ratings agencies have already announced that their ratings will reflect *Octagon* concerns if the seller of the receivable is located in the Tenth Circuit. . . ."); *Rating Agencies Seek to Minimize Octagon Ruling, VIII* Mortgaged-Backed Security Letter *No. 39, 8 (September 27, 1993);* Dawson and Hourican, *S & P Adopts Interim Receivable-Backed Criteria,* Standard & Poor's Creditweek, 37-38 (August 16, 1993); *See also* Schwarcz, *'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Based Finance*, 210 N.Y.L.J. No. 24, 2, 7 (August 4, 1993).

financing technique of asset securitization will bear the brunt of the impact of the decision below, effectively precluding companies from using this form of capital formation for the immediate future in the states within Tenth Circuit.

Asset securitization is a finance technique in which income-producing assets ("Assets") from an operating concern are sold to a trust or other "special purpose entity" that issues securities evidencing an equity interest in or collateralized by the Assets. Payments due to holders of these securities are paid by the special purpose entity directly from the income produced by the Assets. Normally, asset-backed securities are rated by national credit rating agencies and sold to investors. As a general matter, credit ratings are based on the capacity to make timely payment of interest and principal, the nature and terms of the underlying obligation and the protection provided by the obligation, in the event of bankruptcy. *See e.g.*, Standard & Poor's Rating Handbook 189-92 (1993). The securities' value to investors is directly related to the credit ratings of the securities.

The special purpose entity holding the Assets is carefully structured so as to limit its risk of becoming bankrupt and to ensure that the proceeds are paid directly and quickly to the holders of the related securities.[4] In addi-

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[4] There are two principal means of insulating the issuing entity from bankruptcy. The first method is to create a trust that has as its res only the income producing assets and as its purpose only to pay the securityholders. The trust then issues equity interests normally known as "pass-through securities" that receive the income of the assets as it passes through the trust. The second method is used in issuing debt instruments. A limited purpose entity that conducts no business except issuing securities and that is prohibited by its charter from filing a bankruptcy petition, will issue bonds that are secured

tion, the sale of the Assets from the original owner (the "Seller") to the special purpose entity is structured as a sale to avoid the possibility that the Assets would constitute property of the estate in the event of the bankruptcy of the Seller. To provide "comfort" to the security holders and rating agency on this latter issue, bankruptcy counsel for the Seller provide what are known as "true sale" opinions, which opine that the sale of the income producing assets to the special purpose entity is effective to transfer ownership and remove them from the possibility of being included in the Seller's bankruptcy estate. The credit-worthiness of the Seller is thus isolated from the credit-worthiness of the securities themselves, allowing the securities to reflect the Assets' true independent value. The ability to divorce the credit worthiness of asset-backed securities from the credit worthiness of the Seller is what distinguishes these securities from traditional forms of corporate financing, such as general obligation bonds, debentures or stock, whose value is a direct function of the issuing entity's general credit worthiness.

The Tenth Circuit's decision eliminates the benefits of securitizing Assets that could be deemed "accounts" or "chattel paper" under the Uniform Commercial Code of any state. By looking solely to Section 102 of Article 9 and holding that an Account sold to a third-party will always be included in the Seller's bankruptcy estate, the decision below undermines the traditional "true sale" doctrine of state law that is the cornerstone of asset-securitization. The Tenth Circuit approach inextricably links the credit-worthiness of the Seller of the Assets to the securities despite the credit-worthiness of the Assets themselves. Because the holding of the Tenth Circuit apply equally to combinations of promissory notes and securities agreements known as "chattel

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solely by the pool of assets that are held by a trustee for the benefit of the securityholders.

paper," the impact of the Tenth Circuit's decision may extend well beyond account securitizations.

The Tenth Circuit's decision has already destroyed the benefits of asset-securitization within the confines of that circuit. Based solely on the Tenth Circuit's decision, Standard and Poor's Ratings Group ("Standard & Poor's"), one of the most widely-used national rating agencies, recently issued an entirely new set of rating criteria for securitizations of assets by Sellers with principal places of business in the Tenth Circuit. Dawson and Hourican, *S&P Adopts Interim Receivable-Backed Criteria*, Standard & Poor's Creditweek 37–38 (August 16, 1993). Not surprisingly, Standard & Poor's newly announced rating criteria link the credit worthiness of the Seller to the related asset-backed securities. Additionally, Standard & Poor's now prohibits the rating of asset-backed securities from Sellers in the Tenth Circuit that do not have credit ratings in its top four rating categories, and will under no circumstances, rate such securities higher than its second highest rating. *Id.* Although Moody's Investors Service, Inc., another widely-used national rating agencies, has not announced new rating criteria, it has stated that the decision below will negatively affect its ratings of securitization transactions in the Tenth Circuit. Adelson, *The Octagon Matter,* Special Comment—Moody's Investors Service Structured Finance, 3 (August 1993). In a special release issued after the Tenth Circuit announced its decision, Moody's said that as a result of the decision "it will be much more difficult for companies located in those states [in the Tenth Circuit] to securitize their accounts." *Id.*

II. THE COURT SHOULD ALSO RESOLVE A CONFLICT AMONG THE COURTS OF APPEALS OVER WHICH ASPECTS OF STATE LAW SHOULD BE APPLIED IN DETERMINING WHETHER, FOR THE PURPOSE OF DEFINING THE BANKRUPTCY ESTATE, THE TRANSFER OF AN ACCOUNT IS EITHER A SALE OR A SECURED LOAN

This case calls upon the Court to address the question of what aspect of state law the federal courts should employ in determining whether a transfer of accounts is a sale or security interest for the purposes of defining the scope of a debtor's bankruptcy estate under § 541(a)(1). The opinion below creates conflicts between a court of appeals by looking solely to Section 9–102 of the relevant Uniform Commercial Code, thereby limiting the use of asset-backed financing in the states that lie within the Tenth Circuit.

The decision below also conflicts with a Ninth Circuit decision holding that in determining whether an assignment of an account is a sale or a transfer for security for the purposes of delineating the debtor's bankruptcy estate, federal courts should refer to Section 2-106 and Section 9-502(b) of the relevant Uniform Commercial Code and the intent of the parties creating the assignment.

Employing part of the rationale espoused by *Majors Furniture Mart v. Castle Credit Corp.*, 602 F.2nd 538 (3d Cir. 1979), the Ninth Circuit in *Dewhirst v. Citibank (In re Contractors Equipment Supply Co.)*, 861 F.2d 241 (9th Cir. 1988), relied on Section 2–106 of the Arizona U.C.C., (Ariz. Rev. Stat. § 47-2106) Section 9-502(b) (Ariz. Rev. Stat. § 47-9502) of the Arizona UCC and the intent of the parties to determine whether the transfer of an account created a secured loan or whether it created a *bona fide* sale. Applying this analysis, the court of appeals held that

the accounts receivable at issue constituted property of the bankruptcy estate under § 541(a)(1) of the Bankruptcy Code. The Ninth Circuit recognized that Article 9 applies to the sale of accounts, but noted that had the assignment at issue been a "true" or absolute assignment (*i.e.*, a sale), this would have been sufficient to remove the account from the debtor's bankruptcy estate. The Ninth Circuit reasoned that because under the facts before it, (a) the agreement had not transferred title, (b) the creditor did not contend that the debtor was not entitled to any surplus proceeds and (c) the parties intended to create only a security interest, the debtor retained an interest in the account. Therefore, the court of appeals concluded that the account was part of the debtor's estate under § 541(a)(1).

By looking solely to section 102 of Article 9, the Tenth Circuit has eliminated the distinction between a sale of an account and a loan secured by accounts for the purposes of defining the bankruptcy estate. Viewed in isolation the Tenth Circuit decision may seem to present a routine question of state commercial law. Considered in light of the decision of the Ninth Circuit, however, it presents an important issue: how are federal courts to resolve inherent conflicts between different aspects of state law for purposes of interpreting the Bankruptcy Code.

CONCLUSION

The Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 92–6065

OCTAGON GAS SYSTEMS, INC.,

Appellant,

vs.

ROY T. RIMMER,

Appellee,

MERIDIAN RESERVE, INC.,

Debtor.

Appeal From The United States District Court
For The Western District of Oklahoma
(D.C. No. CIV-91-1411-W)

Thomas J. Moore (Christian C. Onsager, Adrienne O. McNamara with him on the brief), of Faegre & Benson, Denver Colorado, for Appellant.

John C. Platt (Joe E. Edwards, Joel W. Harmon with him on the brief), of Edwards, Sonders & Propester, Oklahoma City, Oklahoma, for Appellee.

Before TACHA, SETH, and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

Octagon Gas Systems, Inc. ("Octagon") appeals from the decision of the United States District Court for the Western District of Oklahoma affirming the bankruptcy

court's order granting Appellee Roy T. Rimmer's motion for summary judgment. We have jurisdiction under 28 U.S.C. § 158(d).

Poll Gas, Inc. ("Poll") was in the business of gathering and selling natural gas in Oklahoma. As part of its business, Poll owned and operated a gas gathering system ("the System"). Prior to 1976, Amcole Energy Corporation ("Amcole") owned ten percent of the Poll stock and four other shareholders owned the remainder of the stock. In May 1976, Amcole entered into an agreement with Poll's remaining four shareholders to purchase all of their shares. Pursuant to the terms of the purchase agreement ("the 1976 Agreement") between Amcole and the other shareholders, the selling shareholders agreed to sell Amcole their 90% of the Poll stock and certain other assets. In exchange, Amcole transferred to each shareholder a proportionate "overriding royalty interest" in the gross proceeds received by Amcole from gas sold through the Poll System. As a result of the 1976 Agreement, Amcole became Poll's sole remaining shareholder. Approximately one-half of Rimmer's "overriding royalty interest" originates from the 1976 Agreement.

On May 31, 1982, Poll, assigned to SINA 79/80 Limited ("SINA") an "overriding royalty interest" in the gross proceeds derived from the Poll System. The remaining half of Rimmer's "overriding royalty interest" arises from the 1982 Assignment.

In 1983 and 1984, Rimmer purchased, from the original assignees, a portion of the "overriding royalty interests" created by the 1976 Agreement and the 1982 Assignment. Subsequently, on January 28, 1987, Amcole, Poll, and Rimmer executed an agreement entitled Assignment of Overriding Royalty Interest ("1987 Assignment"). *See*

supra note 3. Pursuant to the parties' various cross-transfers, the 1987 Assignment provided that " . . . Rimmer will own from this date forward a full Five Percent (5%) perpetual overriding royalty interest on all proceeds payable to [Poll] under the [System] . . . ." Appellant's App. at 83–86.

In 1988, Poll commenced this Chapter 11 bankruptcy case. Prior to filing the petition in bankruptcy, Poll, pursuant to the 1987 Assignment, paid Rimmer five percent of its proceeds from the sale of gas through the System. During the pendency of the bankruptcy estate, the bankruptcy trustee continued to pay this five percent interest to Rimmer.

In January 1990, the bankruptcy court confirmed the trustee's reorganization plan. Under the plan, the Poll System[1] was conveyed to Norwest Bank Minnesota ("Norwest") or its designee, in satisfaction of Norwest's secured claim. The Plan provided that the Poll System would be transferred to Norwest "free and clear of liens, claims, interests, and encumbrances." Appellant's App. at 130. Thereafter, Norwest conveyed the System to Octagon. After assuming control of the System, Octagon refused to recognize any interest held by Rimmer in the System gas sale proceeds and failed to make any payments to Rimmer. Consequently, this action was commenced by a creditor of Rimmer, Bonnet Resources Corporation, alleging it is secured by Rimmer's interest in the System's gas sale proceeds. Rimmer subsequently brought a motion for intervention. The bankruptcy court granted Rimmer's

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[1]The Poll System included all gas purchase and sales contracts pursuant to which the System buys and sells gas and all accounts receivable from the sale of gas or gas liquids by the System.

motion and exercised jurisdiction to determine whether the Plan effectuated a transfer of Rimmer's five percent interest to Octagon, or whether Rimmer's interest survives as personal property owned by Rimmer.

On cross motions for summary judgement, the bankruptcy court held that Rimmer owned a five percent interest in the proceeds of gas sold through the Poll System which was not affected by the Plan or the transfer of the Poll System to Octagon. The court, rejecting Octagon's argument that Article 9 of the Uniform Commercial Code ("U.C.C.") applied, reasoned that Rimmer's partial interest in the proceeds from the sale of gas was a "good" and amounted to a proportionate ownership right. The court found that Rimmer's interest was not property of Poll's bankruptcy estate and therefore could not be transferred by the estate to Octagon. The bankruptcy court granted summary judgment in favor of Rimmer, and the district court summarily affirmed.

On appeal Octagon raises numerous issues, among them: (1) whether the bankruptcy court erred in finding that Rimmer had an interest in the Poll System gas sale proceeds, and (2)whether the bankruptcy court erred in determining that Article 9 of the U.C.C. was inapplicable to Rimmer's interest. Because we remand in order for the court to apply Article 9, we do not address Octagon's remaining issues.

We review a court's order granting summary judgment de novo. *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). We examine the record to determine whether any genuine issue of material fact exists, and, if not, whether the substantive law was applied correctly. *Hokansen v. United States*, 868 F.2d 372, 374 (10th Cir. 1989) (citation omitted).

I.

Octagon argues that Rimmer had no enforceable interest in the Poll System gas sales proceeds. Octagon's only argument concerning this issue that merits extensive discussion pertains to the 1976 Agreement.[2] Octagon contends that because Poll was not a party to the 1976 Agreement, the portion of Rimmer's interest that derives from the 1976 Agreement is not an enforceable interest in the Poll System gas sale proceeds; rather it is only an enforceable interest against Amcole in the amount Amcole received from Poll.[3]

Whether or not Rimmer has an enforceable interest in the Poll System proceeds and the characterization of that claimed interest are matters of state law. *See Paul v. Monts*, 906 F.2d 1468, 1475 (10th Cir. 1990). In construing the meaning of a written contract, the intent of the parties controls. *Founders Bank & Trust Co. v. Upsher*, 830 P.2d 1355, 1361 (Okla. 1992) (citing Okla. Stat. Ann. tit. 15, § 151-153 (West 1981)). Where the language of the

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[2]As to Octagon's other arguments, we reject Octagon's contention that even if Rimmer had an interest in Poll's proceeds, he had no interest in Octagon's proceeds. If Rimmer had an interest in the Poll System's gas sale proceeds, it would have survived the sale of the System to Octagon. *See supra* note 1 (Poll System ultimately conveyed to Octagon included accounts receivable from the System's sale of gas). Further, given our conclusions in part II, *infra*, we need not address Octagon's arguments that Rimmer did not "own" a five percent interest in Poll's proceeds.

[3]As a threshold matter, we agree with the bankruptcy court that the use of the term "overriding royalty interest" in the underlying transactions is technically incorrect for lack of an oil and gas leasehold estate. *See* Appellant's App. at 63. Nevertheless, the transactions created an enforceable interest the Poll System's gas sale proceeds. *See infra*.

contract alone does not clearly set forth the intent of the parties, the court may look to extrinsic evidence. *See Panhandle Coop. Royalty Co. v. Cunningham*, 495 P.2d 108, 112–113 (Okla. 1971); *Pollock Stores Co. v. Draper*, 215 P.2d 843 (Okla. 1950).

Although Poll was not a party to the 1976 Agreement, the portion of Rimmer's interest that derives from the 1976 Agreement is an enforceable interest in the Poll System's gas sale proceeds. First, we hold that the intention of the parties is not clearly ascertainable from the writing alone.[4] As a result, we look to the parties' course of dealing and the undisputed affidavit of one of the parties—Frank Cole, president of Amcole in 1976—which clearly indicate that the intent of the parties was to create enforceable interests in the Poll System's gas sale proceeds, not interests in proceeds Amcole received from Poll. Throughout the nearly fourteen years following the execution of the 1976 Agreement, Poll itself, not Amcole, paid the owners of the interests conveyed in the 1976 Agreement their proportionate share of Poll's proceeds. According to Cole, the parties' intent was that Amcole's sole obligation with respect to the payment of the created interests arose from its status, following the 1976 Agreement, as Poll's sole shareholder. The parties intended that the created interests were in Poll's proceeds, not in Poll proceeds received by Amcole.

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[4]The language of the 1976 Agreement is ambiguous. For example, the Agreement specifies that the interests created in favor of the selling shareholders are interests in the proceeds *received by Amcole* through the Poll System. However, Amcole itself received, under the 1976 Agreement, one of these interests in the amount of ten percent. In other words, to give this phrase its literal effect, we would have to conclude that Amcole made an agreement to pay itself.

Of course, the 1976 Agreement could not have created interests in the Poll System gas sale proceeds unless the parties to the 1976 Agreement had the capacity to bind Poll to the Agreement and sell interests in Poll's proceeds, or unless Poll subsequently ratified the Agreement. Contracts involving all of a corporation's shareholders are binding on the corporation, 12B William M. Fletcher, *Fletcher's Cyclopedia of the Law of Private Corporations*, § 5743 (perm. ed. rev. vol. 1984), and under Oklahoma law in effect in 1976, shareholders had the right to authorize the disposition of corporate assets, Okla. Stat. Ann. tit.18, § 1.164(b) (West 1971) (repealed 1986). Additionally, a corporation, by subsequent action, may ratify a contract entered in its behalf. *East Ctr. Okla. Elec. Coop., Inc. v. Oklahoma Gas & Electric Co.*, 505 P.2d 1324, 1329 (Okla. 1973). We hold that under either theory, the 1976 Agreement created an enforceable interest in Poll's proceeds.

All of Poll's shareholders and directors were parties to the 1976 Agreement. This being the case, the shareholders had the capacity to dispose of Poll's assets and bind Poll to the Agreement. Because this was the intent of the parties, the effect of the 1976 Agreement was to create enforceable interests in Poll's proceeds. Alternatively, Poll's continuous payment of the interests over nearly fourteen years evidences its ratification of the 1976 Agreement. *See Blunt v. Blunt*, 176 P.2d 471, 472 (Okla. 1947). Because we hold that the 1976 Agreement, in addition to the 1982 Assignment and the 1987 Assignment, created an enforceable interest in the Poll System gas sale proceeds, we uphold the bankruptcy court's determination that Rimmer had an interest in the Poll System's gas sale proceeds.

II.

Throughout this litigation, Octagon has maintained that Rimmer's interest is an "account" governed by Article 9 of the U.C.C. as adopted by Oklahoma. Rimmer has conceded that his interest is an "account," but argues that regardless of Article 9, he "owns" the interest, not Poll, and therefore his interest has never been property of Poll's bankruptcy estate. The bankruptcy court held that Article 9 was inapplicable because Article 9 provides a classification of interests for the purpose of determining competing secured interests, "not a classification for the creation of an ownership right in personal property." Order of July 26, 1991 at 6–7, *In Re Meridian Reserve, Inc.*, No. BK-88–06519-BH, (Bankr. W.D. Okla. July 29, 1990).

"Article [9 of the U.C.C.] sets out a comprehensive scheme for the regulation of security interests in personal property and fixtures." Okla Stat. Ann. tit. 12A, § 9–101 (West 1963) (Official Comment). The aim of Article 9 is "to provide a simple and unified structure within which the immense variety of present-day secured financing transactions can go forward with less cost and with greater certainty." *Id.* As a means towards achieving this end, Article 9 lays out the steps a party must take to create a valid security interest. *See* Okla. Stat. Ann. tit. 12A, art. 9 pt. 2 (West 1963 & Supp. 1993). These steps include "attachment" of a security interest, and "perfection" of the interest. *See* Okla. Stat. Ann. tit. 12A, §§ 9-204, 9–302 to 9-305 (West Supp. 1993). Article 9 also provides for priority among competing claims of purchasers and creditors of the debtor. *See* Okla. Stat. Ann tit. 12A, art. 9 pt. 3 (West 1963 & Supp. 1993). Although Article 9 applies mainly to transactions intended to create security interests, it also applies to sales of accounts, Okla. Stat. Ann.

tit. 12A, § 9-102(1)(b) (West Supp. 1993), because sales of wholly intangible interests in accounts create the same risks of secret liens inherent in secured transactions. *See* Dan T. Coenen, *Priorities in Accounts: The Crazy Quilt of Current Law and a Proposal for Reform*, 45 Vand. L. Rev. 1061, 1073-74 (1992).

As a starting point in our analysis, we must determine whether Rimmer's interest in the Poll System's gas sale proceeds is an "account" as defined by Article 9 of the U.C.C. as adopted by Oklahoma. *See* Okla. Stat. Ann. tit. 12A, §§ 9-101 to 9–507 (West 1963 & Supp. 1993). Article 9 applies to transactions involving personal property. Okla. Stat. Ann. tit. 12A, § 9-102(1) (West 1963). One form of personal property to which Article 9 applies is an "account" which is defined as "any right to payment for goods sold . . . which is not evidenced by an instrument or chattel paper." Okla. Stat. Ann. tit. 12A, § 9-106 (West Supp. 1993). Section 9-105(1)(h) states that "goods" includes "all things which are movable at the time the security interest attaches . . . but does not include . . . minerals or the like, including oil and gas, *before extraction*." *Id.* § 9-105(1)(h) (emphasis added).

Natural gas, once extracted, becomes personal property in Oklahoma, *Continental Supply Co. v. Marshall*, 152 F.2d 300, 305 (10th Cir. 1945), *cert. denied*, 327 U.S. 803 (1946), and as such, is subject to Article 9. Also, by negative implication, section 9-105(1)(h) indicates that minerals, including gas, *following extraction*, come within Article 9's definition of a "good." *See In Re Fullop*, 125 B.R. 536, 539-40 (Bankr. S.D. Ill. 1990), *aff'd*, 133 B.R. 627 (S.D. Ill. 1991); Barkley Clark, *The Law of Secured Transactions Under the Uniform Commercial Code*, ¶ 13.3[1] (1980). Here, the gas sold is extracted. Because

extracted gas is a "good," Poll's right to payment for gas sold, as well as Rimmer's five percent interest in Poll's right to payment, is an account.

Having determined that the interest acquired by Rimmer is an account under Article 9, it follows that Article 9 applies to Rimmer's five percent interest in the Poll System's gas sale proceeds (hereinafter referred to as "Rimmer's account"), even though the transactions giving rise to Rimmer's account were not intended to secure a debt. The U.C.C. Official Comment 2 to Okla. Stat. Ann. tit. 12A, § 9-102 (West Supp. 1993), explains that in the case of commercial financing on the basis of accounts, "the distinction between a security transfer and a sale is blurred, and a sale of such property is therefore covered by [9-102(1)(b)] *whether intended for security or not*. The buyer is then treated as a secured party and his interest as a security interest." (emphasis added). Section 9-102(1)(b) states that Article 9 applies "to any outright sale of accounts." Further, the term "security interest" as defined by Article 9, expressly includes "any interest of a buyer of accounts," Okla. Stat. Ann. tit. 12A, § 1-201(37) (West Supp. 1993), and "secured party" includes "a person to whom accounts . . . have been sold." *Id.* § 9-105(1)(m). Additionally, section 9-105(1)(d) defines "debtor" as including "the seller of accounts," and, under section 9-105(1)(c), "collateral" includes "accounts . . . which have been sold." These provisions clearly indicate that the buyer of an account is treated as a secured party, his interest in the account is treated as a security interest,

the seller of the account is a debtor, and the account sold is treated as collateral.[5]

We must now determine whether the fact of Poll's bankruptcy alters the application of Article 9 to Rimmer's account. Under § 541 of the Bankruptcy Code, the property of the bankrupt's estate includes, "all legal or equitable interests of the debtor in property as of the commencement of the case." In *United States V. Whiting Pools, Inc.*, 462 U.S. 198 (1983), the Supreme Court, noting that § 541 has an expansive scope, determined that § 541 merely defines what is included in the bankrupt's estate rather than placing a limit on the scope of the estate. *Id.* at 203. The Court also pointed out that, under § 541, property of the bankrupt's estate includes any property subject to a security interest. *Id.* at 203-04. The impact of applying Article 9 to Rimmer's account is that Article 9's treatment of accounts sold as collateral would place Rimmer's account within the property of Poll's bankruptcy estate. Further, if it is determined that Rimmer's account was not properly perfected, then, upon Poll's filing of bankruptcy, the bankruptcy trustee as a lien creditor would have a security interest superior to that of Rimmer.[6] *See In Re Reliance Equities, Inc.*, 966 F.2d

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[5]This application of Article 9 to sales of accounts has also been developed in case law. *See e.g., Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538 (3d Cir. 1979); *United States v. Trigg*, 465 F.2d 1264 (8th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *In Re Flowers*, 78 B.R. 774 (Bankr. D.S.C. 1986); *In Re Cripps*, 31 B.R. 541 (Bankr. W.D. Okla. 1983); *Daly v. Shrimplin*, 610 P.2d 397 (Wyo. 1980).

[6] Under the Bankruptcy Code, the bankruptcy trustee has the rights of a hypothetical lien creditor. 11 U.S.C. § 544; *see also* 4 *Collier on Bankruptcy*, ¶ 544.02 (Lawrence P. King ed., 15th ed.

1338, 1344 (10th Cir. 1992); *United States v. Trigg*, 465 F.2d 1264, 1269 (8th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973); *In Re Cripps*, 31 B.R. 541, 543 (Bankr. W.D. Okla. 1983).

Rimmer contends, and the bankruptcy court held, that because Rimmer "bought" the account, he had title to the account and "owned" the account, and Poll no longer had any ownership interest in the account. Therefore, Rimmer argues, when Poll filed for bankruptcy, Poll's bankruptcy estate did not include Rimmer's account. Although acknowledging that Article9 applies to sales of accounts, Rimmer argues that when deciding whether the account is property of the bankrupt's estate, the sale of an account must be distinguished from the transfer of an account for security. Simply put, Rimmer's argument rests on the principle that he, not Poll, owned the account as of the date of the sale.

We do not agree that the assignment of the account to Rimmer effectuated a transfer to Rimmer of all property interests in the account, leaving Poll with no property interest in Rimmer's account which the bankruptcy trustee could reach under 11 U.S.C. § 541. Rimmer has advanced no sound argument, based either on post-U.C.C. case law or policy, as to why Article 9 should not be applied here. In fact, our review of the structure of Article 9, the available case law, and the policies underlying Article 9 and the Bankruptcy Code convinces us that a debtor's sale of an account, prior to filing for bankruptcy, does not neces-

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1993). Accordingly, the trustee prevails over an Article 9 claimant whose interest is unperfected as of the date of filing of bankruptcy. Okla. Stat. Ann. tit. 12A, § 9–301(1)(b) (West Supp. 1993).

sarily place that account beyond the reach of the bankruptcy trustee.

As the Eighth Circuit explained in *United States v. Trigg*, 465 F.2d at 1268, Article 9 does not attempt to classify a debtor's interest in the collateral as a property right or a specific legal interest. Article 9 also does not speak in terms of who has title to collateral among competing parties. *Id.*; Okla. Stat. Ann. tit. 12A, § 9-101 (West 1963) (Official Comment). Rather, Article 9 "focuses on the rights and duties of the secured party, the debtor, and third parties." Okla. Stat. Ann. tit. 12A, § 9-101 (West 1963) (Official Comment); *see also Trigg*, 465 F.2d at 1268. Article 9 grants rights in the collateral to creditors in the event a secured party fails to perfect his interest, Okla. Stat. Ann. tit. 12A, § 9-301 (West Supp. 1993), regardless of the location of title and regardless of the debtor's or secured party's legal interest in the collateral. *Id.*; *see also Trigg,* 465 F.2d at 1268. This Article 9 scheme applies with equal force to the sale of accounts. Article 9 treats the interest acquired by a buyer of accounts as a security interest and treats the buyer as a secured party. *See supra*. Accordingly, the seller or assignor of the account "does not part with all transferable rights in [the] account [ ] even following an absolute assignment." Coenen, *supra*, at 1079.

In *Trigg*, 465 F.2d 1264, the Eighth Circuit addressed a transfer of ownership argument as it applied to a tax lien. In that case, an account assignee argued that the assignment of accounts was a transfer of property rights in the accounts leaving no property rights[7] in the debtor which

[7]Under the Tax Code, a United States tax lien attaches to a debtor's "property" or "property rights." 26 U.S.C. § 6321.

the United States could attach via a tax lien. *Id.* The court rejected the assignee's argument based on the applicability of Article 9 to the assignment of accounts. *Id.* Without defining what property rights the debtor retained after assigning the accounts, the court concluded that the assignment, "did not place the progress payments beyond the reach of the federal tax lien." *Id.* at 1269; *accord Southern Rock. Inc. v. B & B Auto Supply*, 711 F.2d 683, 685 (5th Cir. 1983); *see also Nevada Rock & Sand Co. v. United States Dept. of Treasury*, 376 F. Supp. 161, 170-72 (D. Nev. 1974). Although the Bankruptcy Code defines property of a bankrupt's estate in terms of "legal or equitable interests of the debtor in property," 11 U.S.C. § 541(a)(1), rather than in terms of "property rights," we find *Trigg* and its progeny instructive and hold that because the transfer of ownership argument fails as to whether the debtor retains "property rights" that can be attached by a tax lien in accounts he has sold, the same argument must also fail in terms of whether the debtor retains "legal or equitable interest" in the accounts sold for purposes of the Bankruptcy Code.

In the context of bankruptcy cases, courts have dismissed arguments identical to the transfer of ownership argument Rimmer advances here. *See e.g., In Re Flowers*, 78 B.R. 774 (Bankr. D.S.C. 1986); *In Re Cawthorn*, 33 B.R. 119 (M.D. Tenn. 1983); *In Re Cripps*, 31 B.R. 541. In *In Re Cripps*, which involved the application of Article 9 under Oklahoma law, the petitioner, a buyer of accounts, argued that because the true nature of the transaction between herself and the debtor was a sale, she gained title to the accounts following the sale, and the accounts were her property, not property of the debtor's bankruptcy estate. *Id.* at 544. The court dismissed the petitioner's

argument, stating that "[t]itle, for purposes of defining rights of parties, is of little relative consequence under [Article 9]." *Id.* (citing *Morton Booth Co. v. Tiara Furniture, Inc.*, 564 P.2d 210 (Okla. 1977). The court went on to conclude that because Article 9 applies to sales of accounts as well as assignments of accounts for security, the account was property of the debtor's estate regardless of the nature of the underlying transaction. *Id.* We find the *In Re Cripps* court's reasoning to be sound.[8]

Finally, acceptance of Rimmer's transfer of ownership or title argument would allow an account buyer to benefit

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[8]Although we accept the reasoning behind *In Re Trigg* and *In Re Cripps*, we believe we must also address the Ninth Circuit case, *In Re Contractors Equipment Supply Co.*, 861 F.2d 241 (9th Cir. 1988). In *In Re Contractors*, the court implied that whether a bankruptcy estate retains a property interest in an account receivable depends on whether the underlying transaction was a sale or a security interest. *Id.* at 245. We do not adopt the court's reasoning for two reasons. First, the court relies, in part, on Article 2 of the U.C.C. which provides that a sale entails passage of title, *id.* (citing Arizona's version of U.C.C. § 2–106), and we find that Article 9, not Article 2, controls in this context. As explained above, the concept of title has no significance under Article 9 of the U.C.C., *see* Okla. Stat. Ann. tit. 12A, § 9-101 (West 1963) (Official Comment) ("Rights, obligations and remedies under the Article do not depend on the location of title."), and furthermore, Article 2 applies to sales of goods, not to sales of accounts. Okla. Stat. Ann. tit. 12A, § 2-102 (West 1963). Second, the court's reasoning that a distinction must be made between a sale of accounts and an assignment of accounts for security was not necessary to its holding, because the court ultimately concluded that the underlying transaction was one for security and therefore Article 9 applied. *In Re Contractors*, 861 F.2d at 245. We could find no cases that relied on *In Re Contractors* to defeat a bankruptcy trustee's claim to a debtor's accounts based on the theory that an earlier sale of the accounts had deprived the bankrupt of any interest in the account.

unfairly, at the expense of the bankrupt debtor's other creditors, from the debtor's filing for bankruptcy. For example, it is beyond dispute that, outside the realm of bankruptcy, a lien creditor would have rights in the accounts superior to the rights of the unperfected buyer of the accounts. *See* Okla. Stat. Ann. tit. 12A, § 9-301 & § 9-312 (West Supp. 1993). However, under Rimmer's theory, once the debtor declares bankruptcy, *the fact of bankruptcy alone* places the accounts sold to the unperfected account buyer beyond the reach of the bankruptcy trustee and all of the bankrupt's creditors. This result is contrary to the similar aims of Article 9 and the Bankruptcy Code. The current Bankruptcy Code was designed, in part, to make bankruptcy law more congruent with the U.C.C. *In Re Antweil*, 931 F.2d 689, 693 (10th Cir. 1991), *aff'd sub nom. Barnhill v. Johnson*, 112 S. Ct. 1386 (1992). The policy behind Article 9 is to ensure certainty for creditors and provide notice of security interests to third parties. *See* Okla. Stat. Ann. tit. 12A, § 9-101 (West 1963) (Official Comment). Likewise, certain provisions of the Bankruptcy Code "are designed to protect creditors by eliminating secret liens." *In Re Reliance*, 966 F.2d at 1344 (citing 11 U.S.C. §§ 544, 546). In keeping with these policies, we hold that because, under Article 9, a sale of accounts is treated as if it creates a security interest in the accounts, accounts sold by a debtor prior to filing for bankruptcy remain property of the debtor's bankruptcy estate.[9]

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[9]Of course, this is not to say that an account buyer with a perfected security interest in an account forfeits his interest upon the debtor's filing for bankruptcy. Although property subject to a security interest is property of the debtor's bankruptcy estate, secured creditors of the debtor are provided "adequate protection" for their interest. *See* 11

Accordingly, we hold that the bankruptcy court erred in concluding that Article 9 was inapplicable to Rimmer's interest. The bankruptcy court must therefore readdress, in light of Article 9, the central issue of whether the reorganization plan effectuated a transfer of Rimmer's interest to Octagon, or whether Rimmer's interest survives the Plan. The court must make findings regarding whether Rimmer's account was a perfected security interest—i.e., whether U.C.C. filings were required or made.[10] The court must also determine the effect, if any, of the trustee's actions concerning Rimmer's account, and the effect, if any, of Rimmer's actions. For these reasons, we REVERSE the entry of summary judgment in favor of Rimmer and REMAND to the district court with instructions to vacate its judgment and remand the case to the bankruptcy court for further proceedings consistent with this opinion.

SETH, Circuit Judge, dissenting:

I must respectfully dissent from the majority opinion as I agree with the determinations made by the United States District Court for the Western District of Oklahoma and by the United States Bankruptcy Judge. Briefly, these were

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U.S.C. § 363(e) (providing that upon a secured creditor's request, bankruptcy court must place limits, as necessary to protect creditor, on trustee's power to sell, use, or lease property of the estate).

[10]The dissent implies that the application of Article 9 to the facts of this case automatically divests Rimmer of his interest. We do not agree that such a result is mandated. For example, upon remand, the court may determine that Rimmer retains his interest because no U.C.C. filing was required under Okla. Stat. Ann. tit. 12A, § 9-302(e) (West Supp. 1993) (no filing required if account assignment does not transfer a significant part of outstanding accounts of assignor).

that the "interest" in issue was never part of the Poll, Inc. bankruptcy estate. The "interest" owned by Mr. Rimmer was in the proceeds of the sale of natural gas collected from producing wells and sold to distributors, especially to Oklahoma Natural Gas Company. It apparently was secured from Amcole.

The Bankruptcy Court, in substance, held that Appellee Rimmer owns a separate and distinct interest in 5% of the proceeds of gas and liquids sold through the Poll Gas System, and that this interest was not in Poll's bankruptcy estate nor impacted by the Trustee's conveyance of the system.

The "interest" of Rimmer which I consider is only that portion derived from what is referred to as the 1976 Agreement or the Agreement, which is herein described. By the Agreement undivided interests were sold by Amcole outright to "Sellers" who were Rimmer's predecessors.

The Agreement was an outright sales agreement signed by all the stockholders and directors who thereby sold all their stock in Poll, Inc. (and two gas wells) to Amcole as Buyer. Amcole was also a stockholder in Poll. As consideration for the purchase of the stock in Poll, Inc., Amcole agreed to pay the purchase price in full, and did so. This purchase price, as stated in the Agreement (including some cash also from Poll, Inc.), was:

> "an Override of the gross proceeds received by BUYER through Poll Gas Inc. from Oklahoma Natural Gas Company under their existing contract and any and all amendments thereto, and all other gas, and liquids purchased and sold, and all additional connections, gas processing and gathering facilities and systems, through the Poll Gas System . . . [in three named counties in Oklahoma]."

The "override" was to total 9% of the proceeds of gas sales and 5% of proceeds from sales of liquids. The Agreement said these were "to be owned" as therein divided among the three named individuals and two corporations. These were the former Poll, Inc. stockholders except for Amcole.

The Agreement was to apply to any purchases of gas or liquids as well by the Oklahoma Natural Gas Company. The Agreement was filed in the county records. Appellee Rimmer was not one of these original sellers of stock, as mentioned, but bought interests from them.

The rest of Rimmer's interest originated in later agreements with other parties. The interests there concerned were also called overriding royalties.

We are concerned with Poll, Inc. as the Debtor, and its bankruptcy estate, not with Amcole. There remained nothing relating to the interests to go into the Poll bankruptcy estate. The ownership had passed by the 1976 Agreement to Amcole, and it as consideration agreed to and did create the "interests," as above described, out of what it bought—Poll Gas, Inc. I agree with the majority that enforceable interests were create by the 1976 Agreement including that owned by Rimmer, but I must disagree that they were part of the Poll bankruptcy estate.

I.

There is a significant aspect of the appeal which relates to the decision of the District Court, and of the Bankruptcy Court, that the "interests" of Rimmer were not part of the Debtor Poll, Inc. bankruptcy estate.

The relationship of the parties and the early transactions, particularly the changes brought about by the 1976 Agreement, must be examined. The Agreement is the

source of the particular interests here considered. Before the 1976 Agreement the Poll corporation gathered gas in the field, transported it, and sold much of it to Oklahoma Natural Gas Company under contracts. Amcole decided to acquire Poll, Inc. by the 1976 Agreement. Under the Agreement *all stock* of Poll which Amcole did not already own vested in Amcole as "Buyer." All stockholders and directors of Poll signed the 1976 Agreement. The majority holds that Poll, Inc. was bound by the Agreement, and I agree.

The unusual part of the Agreement was that Amcole, as Buyer (of the stock), was obligated to use assets of Poll, that is, the gas sales contracts with Oklahoma Gas Company or the proceeds therefrom to pay the former Poll stockholders—the Sellers. To do this, and it was done, Amcole necessarily had to exercise ownership of these interests formerly of Poll, Inc. The actions of Amcole, and its performance as Buyer for its own benefit, demonstrated this ownership. It was the only way it could perform its obligation. "Control" of Poll could not do this. There would be no ownership of the interests in question after the 1976 Agreement remaining in Poll. Poll obtained no benefits under the Agreement and it lost assets. It undertook the duty to remit sales proceeds formerly its own. This was done in the capacity of a *cestui que* trust as would arise under an oil payment or similar interest. It had a duty to remit and nothing more. See Corbin on Contracts, § 873 at 823 and § 902 at 853.

Thus the "interests," which the majority defines as "accounts" *under the 1976 Agreement*, passed to Amcole as part of the sale of Poll, Inc. U.C.C. § 9-104(e) Supp. They could not then be part of the Poll, Inc. estate. Whether they were part of the Amcole estate the record

does not reveal. This is one of the elements supporting the District Court's holding that the interests were not part of the Poll estate.

II.

There is another reason why the Rimmer interest did not become part of the Poll estate.

The use by the original parties to the 1976 Agreement, and the continued use of the term "override" in later agreements between successors to the interests as a description of the interests created, is significant and cannot be ignored. It was obvious that the parties adopted the accepted characteristics and consequences of "overrides" as applicable and descriptive of the interests created. This was a clear and obvious description for them to apply to the "interests." It was in commonly used terms in the business. They adopted and applied the consequences and characteristics of such an interest in their agreements. This was clearly expressed, the intent was clear, and it can make no difference that the term is not applied to an interest of the type here concerned if its meaning they adopted and applied. We are not concerned with how the term may have been used by others. Certainly the 17+ years of "continued course of dealing" shows what the parties meant. *See* U.C.C. (with comments) § 1-102 and § 1-105.

It is apparent that the consequences, nature and scope of an "override" were adopted as descriptive as there were no time limits or period to restrict the perpetual term of such an interest and there was also *no dollar limit*. With such a permanent interest and without limits of time and money, the use or misuse of the term "override" was a clear expression or description. The nature and scope were well known and accepted.

The years of "continued course of dealing" by the parties and successors adopted its meaning and this should be sufficient under the U.C.C. An "agreement" under the U.C.C. as to consequences which would otherwise flow from the provisions of the U.C.C. includes the effect of a course of dealing (§ 1-102, § 105).

The intent of the parties must be applied. There is no indication whatever that the Agreement or the interests were in any way intended to be a security agreement. The course of dealing was the equivalent to an "agreement" of the parties as described in the U.C.C., which modifies the U.C.C. terms, and determines the real nature of the interests.

III.

The position taken by the majority is that the interest of Mr. Rimmer was put in the Poll bankruptcy estate by Article 9 of the U.C.C. This position is based only on the theory that the interest fell within the Article 9 definition of an "account," and if it was an "account" it automatically was included in the Debtor's estate. This was, according to the majority, to follow regardless of the intention of the parties to the Agreement and the years of "course of dealing." When the definition was applied it was automatically something none of the parties intended, nor what it actually was as demonstrated over the 17 years. The record shows there was no debt, the interest was paid for in full, the intent was perpetual, and the interest had no dollar limit. There was no hint of commercial financing.

To apply the "account" definition is to reverse the completed 1976 sale and revest the interest in Poll. Rimmer apparently paid several hundred thousand dollars to buy the interest and the application of Article 9 would divest him of the interest. By all indications in the majority

opinion he would become at most an unsecured creditor in the estate of the corporation which probably was never the source of interest to permit the application of Article 9.

The consequences of the application of Article 9 demonstrates that it is not applicable. The U.C.C. by fiat cannot change the consequences and legal nature of a transaction contrary to the intent of the parties.

The most that the statute could do, in Article 9, and this may be what it does, is to require the consequences therein provided, that is, to require this to be a security transaction, *unless a contrary intention and purpose of the parties can be shown*.

I would affirm the trial court.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT FOR
THE
WESTERN DISTRICT OF OKLAHOMA

CASE NO. 88-06159, et seq.,
(Administratively consolidated
Chapter 11 proceedings)

DISTRICT COURT CASE NO.
CIV-91-1411-W

IN RE:

MERIDIAN RESERVE, INC., ET AL.

Debtors.

OCTAGON GAS SYSTEMS, INC.,

Appellant,

v.

ROY T. RIMMER, JR.,

Appellee.

ORDER

Octagon Gas Systems, Inc. (Octagon) appeals from an Order entered on July 29, 1991, by The Honorable James E. Ryan, United States Bankruptcy Judge, wherein he granted the Motion for Summary Judgment filed by intervenor-plaintiff Roy T. Rimmer, Jr. Judge Ryan found that

the "interest"[1] held by Rimmer in the proceeds generated by the sale of natural gas produced by oil and gas wells attached to a gas gathering system was not property of the estate of the debtor, Poll Gas, Inc. (Poll), and was not capable of transfer by the estate or affected by the terms of the debtor's Plan of Reorganization. Octagon had acquired the gas gathering system from Poll's trustee in bankruptcy and had challenged Rimmer's claim that his interest in the proceeds survived Octagon's acquisition of the system.

Neither recitation of the events giving rise to this adversary proceeding nor summarization of the parties' many authorities and arguments is necessary. The Court has reviewed the lengthy record in this case as well as read the transcripts of the hearings at which the nature of the interest held by Rimmer was addressed. Based upon this review, the Court concludes that Judge Ryan did not err in finding that Poll could and did transfer to Rimmer the subject interest and that this interest in proceeds derived from future gas sales was not affected by the terms of the confirmed Plan of Reorganization and/or the purchase of gas gathering system by Octagon. Accordingly, the Order of July 29, 1991, is AFFIRMED and this appeal is DISMISSED.

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[1]Throughout the record, the interest is most often described as an "overriding royalty interest." Judge Ryan found that this description was incorrect in the absence of any underlying oil and gas leasehold estate.

ENTERED this 22nd day of January, 1992.

/s/ LEE R. WEST
UNITED STATES DISTRICT JUDGE

ENTERED IN JUDGMENT DOCKET
ON 01/22/92

APPENDIX C

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

Case No. 88-6519, et seq.
(Administratively consolidated
Chapter 11 proceedings)

Adv. No. 90-0131
(Assigned to J. Ryan)

IN RE:

MERIDIAN RESERVE, INC., ET AL.

Debtors,

BONNET RESOURCES CORPORATION,

Plaintiff,

ROY T. RIMMER, JR.,

Intervenor-Plaintiff,

VS.

AINSLIE PERRAULT, JR.,
Chapter 11 Trustee, and
OCTAGON GAS SYSTEMS, INC.,

Defendants.

ORDER

This proceeding is being resolved upon the joint Motions for Summary Judgment filed by counsel for the following parties, to-wit:

Party	*Counsel*
Plaintiff, Bonnet Resources Corporation	Troy D. Phillips and Michael D. Scanlon of Baker, Glast & Middleton Dallas, Texas
Intervenor-Plaintiff, Roy T. Rimmer, Jr.	Joe E. Edwards, John C. Platt, J. Clay Christensen and Joel W. Harmon of Edwards, Sonders & Propester Oklahoma City, Oklahoma and Barkley Clark of Shook, Hardy & Bacon Kansas City, Missouri
Defendant, Ainslie Perrault, Jr.	Michael Paul Kirschner and Alice A. Sias of Hastie and Kirschner Oklahoma City, Oklahoma
Defendant, Octagon Gas Systems, Inc.	Donald A. Pape of Donald A. Pape, P.C. Norman, Oklahoma

A review of the file and pleadings with attached documents does not reveal a genuine issue as to any material fact and thus final relief is being afforded as a matter of law in this core proceeding by the following findings, conclusions and order in accordance with B.R. 7052:

BACKGROUND

As an aid, the Court will summarize the underlying Chapter 11 case in this proceeding as follows:

> The Chapter 11 case was voluntarily commenced in late 1988 by the separate Petitions of the principal Debtor,

Meridian Reserve, Inc., and its twenty-one (21) affiliates (co-Debtors). Upon commencement of the case, co-Debtor, Poll Gas, Inc., owned a gas gathering system and the proceeds therefrom which when in operation purchases, gathers and sells natural gas produced by oil and gas wells attached to the system. Poll also, pre-Petition, paid a portion of the proceeds, as an "overriding royalty," from gas sales through the system to Intervenor-Plaintiff Roy T. Rimmer, Jr.

The confirmed Plan provided that the gas gathering system would be transferred in partial satisfaction of a secured debt to Norwest Bank Minnesota or its designee. As revealed by the record, during the hearing on confirmation a concern arose as to whether the "overriding royalty" interest in proceeds from gas sales held by Roy T. Rimmer constituted property of the estate, thus being conveyed by the estate to Norwest Bank Minnesota. This concern was discussed and reserved for post-confirmation determination by the Court.

In accord with the confirmed Plan, the necessary parties— Norwest Bank Minnesota, the Chapter 11 Trustee and the Plan Administrator—conveyed to Octagon Gas Systems, Inc. the Poll Gas, Inc. asset known as the gas gathering system along with associated contracts. Octagon Gas Systems, Inc., after assuming control of the gas gathering system, brought the determination of the interest held by Roy T. Rimmer, Jr. in the gas proceeds to the forefront by not recognizing and paying any proceeds to Mr. Rimmer. Therefore, this proceeding was commenced by an attorney-in-fact for a creditor of Roy T. Rimmer, Jr. alleging it is secured by the interest in proceeds held by Roy T. Rimmer, Jr. and that the creditor is entitled to that portion of the proceeds of gas sales due Mr. Rimmer.

The Court is recognizing the Complaint in consideration of the confirmation reservation as a request for declaratory relief; therefore, *only* to determine whether the Plan terms effectuated a transfer of the "overriding royalty" interest to Octagon Gas Systems, Inc. as being

property of the Poll Gas, Inc. estate or whether the "overriding royalty" interest survives as personal property owned by Roy T. Rimmer, Jr.

This Court lacks the appropriate in personam jurisdiction to resolve the priority dispute between Plaintiff Bonnet Resources Corporation, as attorney-in-fact, and Defendant Octagon Gas Systems, Inc., thus determining the ultimate entity entitled to receive the interest held by Roy T. Rimmer, Jr. as neither party is a creditor of this consolidated estate.

FINDINGS OF FACT

1. By Agreement of May 17, 1976 (AGREEMENT), Amco, predecessor of co-Debtor, Amcole Energy Corporation (AMCOLE) purchased the outstanding shares of common stock held by four shareholders in Poll Gas, Inc. (POLL) which owned and operated a gas gathering system (SYSTEM) situated in Payne, Lincoln, Logan and Oklahoma Counties in Oklahoma.

AMCOLE, simultaneously with the stock purchase and as part of the consideration in the AGREEMENT with the shareholders, created and transferred a proportionate *"overriding royalty" interest in the gross proceeds derived from sales of natural gas/liquids through the SYSTEM* (INTEREST) to each shareholder. It was further agreed on page 2 at paragraph (3.) of the AGREEMENT that the "overriding percentage" was to be *"owned"* by each shareholder. Although AMCOLE created/transferred the partial INTEREST in proceeds from gas sales through the SYSTEM, it should be noted that POLL owned the SYSTEM and thus the sale proceeds realized therefrom.

2. On May 31, 1982, POLL executed an additional Assignment of Overriding Royalty Interest (ASSIGNMENT) in the gross proceeds received from the sales of natural gas through the SYSTEM (INTEREST) to SINA.

On various dates subsequent to the creation of the aforementioned interests, all owners did "sell, grant, convey, let and assign unto Roy T. Rimmer, Jr." (RIMMER) all of their interest.

3. On January 28, 1987, when AMCOLE, POLL and RIMMER executed the instrument labeled Assignment of Overriding Royalty Interest (AORRI), POLL owned the entire gas gathering system and the proceeds therefrom as well as possessing the unfettered power/right to transfer ownership of a proportionate interest in the proceeds produced by gas sales through the SYSTEM to third persons.

The validity of the AORRI is unchallenged and rests upon the recited consideration of various cross-transfers by the parties of their separately owned personal property as well as clearly providing that ". . . Rimmer will (would) own from this date (1/28/87) forward a full Five Percent (5%) perpetual overriding royalty interest on all proceeds payable to Poll Gas, Inc. under the Poll gas gathering system, . . . free and clear of all costs except . . . its proportionate part of all taxes levied against said proceeds."

4. The Chapter 11 Trustee during the pendency of the estate and prior to confirmation did not utilize the estate's ability to acquire or sell the "overriding royalty" INTEREST held by RIMMER but rather recognized and periodically paid the INTEREST to RIMMER. Further, neither the Trustee nor the Plan Administrator claims the INTEREST held by Roy T. Rimmer, Jr.

CONCLUSIONS OF LAW

A. The nature and character of the right to receive a portion of the cash proceeds received by the SYSTEM owner now held by RIMMER must be determined with reference to its creation, the initial transfer and the intent

of the parties as expressed in the AGREEMENT of May 17, 1976, the ASSIGNMENT of May 31, 1982 and the AORRI of January 28, 1987.

The right to/interest in proceeds was created by AMCOLE/POLL upon execution of the AGREEMENT/ASSIGNMENT/AORRI (CONVEYANCES) and conveyed a partial and divisible interest in the cash proceeds received by POLL from future natural gas sales through the SYSTEM. Proceeds from sales of severed natural gas are personal property[1] with the rights to/interests in being classified as a "thing in action."[2] An ownership right in a "thing in action" can be created by a transfer[3] *Okla. Stat. Ann. tit.60, 331(3) (West 1971)*, if without limitation/condition upon the possession/enjoyment.

The CONVEYANCES are Contracts of Sale[4] between merchant[5] parties which create and transfer a partial interest, as "Goods,"[6] to the proceeds from future gas sales. A practical construction[7] of the CONVEYANCES made by the merchant parties (all involved in the common business of buying and selling oil/gas rights) and the usage of the term "overriding royalty" in the oil and gas trade[8] allows this Court to conclude that the intent of the parties was to convey a separate, distinct and proportionate ownership right to the future cash proceeds from gas sales as the term "overriding

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[1] *Hancock v. Farmers Mills & Elevator Co.*, 287 P.2d 214 (Okla. 1955)

[2] *Okla. Stat. Ann. tit. 60, § 312 (West, 1971)*

[3] *Okla. Stat. Ann. tit. 60, §331(3) (West 1971)*

[4] *Okla. Stat. Ann. tit. 12A, §2-1061(1) (West 1963)*

[5] *Okla. Stat. Ann. tit. 12A, §2-104(1) (West 1963)*

[6] *Okla. Stat. Ann. tit. 12A, §2-105(1), (3) (West 1963)*

[7] *Okla. Stat. Ann. tit. 12A, §2-208(1), (2) (West 1963)*

[8] *Okla. Stat. Ann. tit. 12A, 1-205(2)(4) (West 1963)*

royalty" is but an expression of intent by the merchant parties that the INTEREST transferred be free of operating/ production expense except properly levied taxes.

The retention by the SYSTEM owner of the obligation to perform—account for and pay future proceeds—effectively created a cestui que trust with the SYSTEM owner being the trustee of the transferred interest and obligated to account and pay the interest (cash proceeds) periodically. The nature of the INTEREST is made especially clear and unequivocal as being an ownership interest with the wording of the AGREEMENT/AORRI that the interest was to be "*owned*" by the transferees.

Further, the AORRI, executed pre-Petition, provides evidence of the unequivocal intent by POLL, as owner of the proceeds, for RIMMER to *own*, after January 28, 1987, a five percent right in the proceeds received from gas sales by the SYSTEM with the quote and stipulation that ". . . Rimmer (would) own from this date forward a full Five Percent (5%) perpetual overriding royalty interest on all proceeds payable to Poll Gas, Inc. under the POLL gas fathering system, . . ." Again, the characterization of the INTEREST, as an "overriding royalty," is technically an error for lack of an underlying oil and gas leasehold estate.

Although AMCOLE, through the AGREEMENT, created and initially transferred the INTEREST on May 17, 1976, rather than the owner of the SYSTEM and proceeds (POLL), this discrepancy was rectified. POLL, from the date of creation until commencing their bankruptcy case, cured and ratified the transaction by their performance of the retained obligation.[9]

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[9]*Okla. Stat. Ann. tit. 15, §70 (West 1983)*

The reference by the parties to the Uniform Commercial Code—Secured Transactions for classification and definition in determining the nature/character of the INTEREST held by RIMMER is misplaced. Article 9 provides a classification of interests in personal property for the purpose of determining competing secured interests held by third persons, not a classification for the *creation* of an ownership right in personal property.[10]

Post-Petition and during the pendency of the POLL estate, the only right/power possessed by the estate as to the INTEREST held by RIMMER was for the benefit of RIMMER, not the estate. Therefore, the disputed INTEREST is not and never has been property of the POLL bankruptcy estate and thus is not capable of transfer by the estate or by the terms of the confirmed Plan.[11]

Upon the above Findings and Conclusions, this Court does herein sustain the Motion for Summary Judgment filed by Intervening Plaintiff RIMMER. The INTEREST held by RIMMER upon the proceeds of future gas sales by the SYSTEM survives as property of RIMMER and is not affected by the confirmed Plan in the underlying case.

DATED this 26th day of July, 1991.

/s/ JAMES E. RYAN
United States Bankruptcy Judge

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[10]*Okla. Stat. Ann. tit. 12A, §9-101, p. 197 (West 1963), Comment to Uniform Commercial Code*

[11]*11 U.S.C. §541(b)(1)*

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 92-6065

OCTAGON GAS SYSTEMS, INC.,

Appellant,

v.

ROY T. RIMMER,

Appellee,

MERIDIAN RESERVE, INC.,

Debtor.

ORDER
Filed July 8, 1993

Before TACHA, SETH, and BALDOCK, Circuit Judges.

The petition for rehearing filed by appellee in the captioned case is denied. Judge Seth would have granted rehearing.

Entered for the Court
ROBERT L. HOECKER, Clerk

By Deputy Clerk

OCT 2 9 1993

No. 93-576

In The

Supreme Court of the United States

October Term, 1993

ROY T. RIMMER, JR.,

Petitioner,

v.

OCTAGON GAS SYSTEMS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Under Oklahoma law, does the seller of an account retain an equitable interest in the account when the purchaser does not properly perfect his purchase by filing a financing statement as required by Oklahoma law?

RULE 29.1 NOTATION

The Respondent, Octagon Gas Systems, Inc., was a subsidiary of Octagon Resources, Inc., at the time this action was commenced. The two corporations have since been merged with Octagon Resources, Inc., being the surviving corporation. Octagon Resources, Inc. has no parent corporation or subsidiary corporations.

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No. 93-576

In The

Supreme Court of the United States

October Term, 1993

ROY T. RIMMER, JR.,

Petitioner,

v.

OCTAGON GAS SYSTEMS, INC.,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Octagon Gas Systems, Inc., submits this brief in opposition to Petitioner's request that this Court issue a writ of certiorari to review the order of the United States Court of Appeals for the Tenth Circuit.

JURISDICTION

The Court of Appeals issued its order reversing the District Court and remanding for further proceedings on May 27, 1993. Pet. App. 17a. The Court of Appeals denied a petition for rehearing on July 8, 1993. Pet. App. 35a. The

jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Contrary to the assertion of Petitioner, the decision in this case does not turn upon the construction of any federal constitutional or statutory provisions. The Tenth Circuit did not use § 541 of the United States Bankruptcy Code, 11 U.S.C. § 541, to include in the debtor's bankruptcy estate an equitable interest which did not exist under state law at the time the bankruptcy petition was filed. Rather, it held that the debtor had such an interest under Oklahoma Statutes Annotated title 12A, §§ 1-201(37), 9-102(1)(b), 9-106, 9-301(1)(b) and (3), and 9-302(1)(e). Because of the length of these provisions, they are set out in the Appendix to this Brief.

STATEMENT OF THE CASE

Prior to October, 1988, Petitioner Roy T. Rimmer, Jr. ("Rimmer") acquired the right to receive five percent of all amounts paid to Poll Gas, Inc. ("Poll") under certain contracts pursuant to which Poll sold natural gas and gas liquids. Under Article 9 of the Oklahoma Commercial Code, the interest which Rimmer acquired from Poll is an "account." Okla. Stat. Ann. tit. 12A, § 9-106.

Pursuant to Okla. Stat. Ann. tit. 12A, §§ 1-201(37), 9-102(1)(b) and 9-302(1), the purchaser of an "account" is treated as having a security interest in the account and

must file a financing statement to "perfect" his purchase regardless of whether the purchase is intended as a true sale or merely as security. The *only* exception to the Oklahoma filing requirement is that no filing is required if the purchased accounts are not a significant part of the seller's total accounts. Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).

Rimmer never filed the financing statement required by Oklahoma law to perfect his purchase of Poll's accounts. Okla. Stat. Ann. tit. 12A, §§ 9-301(1)(b) and (3) expressly provide that the interest of a purchaser of accounts, such as Rimmer, who fails to file a financing statement to perfect his purchase is subordinate to the interests of a lien creditor, including specifically a trustee in bankruptcy.

In October, 1988, Poll filed a petition for reorganization under Chapter 11 of the United States Bankruptcy Code. In January, 1990, Poll confirmed a plan of reorganization which provided for the transfer of the accounts in which Rimmer claims an interest to Respondent Octagon Gas Systems, Inc. ("Octagon").[1] The plan expressly provided that the transfer was to be "free and clear of all liens, claims, interests and encumbrances." Pet. App. 3a. Rimmer did not object to the transfer of the accounts free and clear of his interest, did not appeal the order confirming Poll's plan, and, in fact, voted to accept the plan.

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[1] Following the commencement of this case, Octagon Gas Systems, Inc., was merged into Octagon Resources, Inc., with Octagon Resources, Inc., being the surviving corporation.

In January, 1991, almost a year after the order confirming the Poll plan had become final and non-appealable, Rimmer argued for the first time that the plan did not effectively convey the interest he claimed in the Poll accounts to Octagon. On cross-motions for summary judgment, the Bankruptcy Court held that the interest Rimmer claimed in Poll's accounts had not been transferred to Rimmer for security and, therefore, Article 9 of the Oklahoma Commercial Code was inapplicable.[2] Because the Bankruptcy Court held that Article 9 was inapplicable, it concluded that Rimmer's "interest" in Poll's accounts was not an asset of Poll's bankruptcy estate and could not be transferred to Octagon as part of Poll's plan. The District Court affirmed the Bankruptcy Court.

Relying on the plain language of Okla. Stat. Ann. tit. 12A, § 9-102(1)(b) and the official comment to that section, the Tenth Circuit correctly found that, under Oklahoma law, all sales of accounts were covered by Article 9 of the Oklahoma Commercial Code regardless of whether the transfer was a true sale or was intended only for security. The Tenth Circuit reversed the judgment in favor of Rimmer and remanded the case to the Bankruptcy Court to determine the effect that application of Article 9

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[2] The Bankruptcy Court erroneously analyzed the case under Article 2 of the Oklahoma Commercial Code which governs sales of "goods." In his brief to the Tenth Circuit, however, Rimmer acknowledged that his interest was an account. *See* Pet. App. 8a. Accordingly, Article 2 of the Oklahoma Commercial Code was not applicable.

would have on the Bankruptcy Court's decision, specifically requesting that the Bankruptcy Court determine whether Rimmer was required to "perfect" his interest by filing a financing statement and whether he did so.[3] Pet. App. 17a. The Tenth Circuit also directed the Bankruptcy Court to determine whether, by voting for Poll's plan of reorganization and failing to appeal the order confirming Poll's plan, Rimmer waived any right he might have had to assert that his interest in Poll's accounts was not transferred to Octagon by the plan. Pet. App. 17a.

SUMMARY OF ARGUMENT

This case does not involve an interpretation of § 541(a)(1) and (d) of the Bankruptcy Code whereby an equitable interest which Poll did not have at the commencement of its bankruptcy case was included in its bankruptcy estate. Rather, the Tenth Circuit held that Poll had an equitable interest in the accounts under state law and, therefore, § 541 required the interest to be included in Poll's bankruptcy estate.

The decision of the Tenth Circuit was based solely on its interpretation of Oklahoma law, and there is no reason for this Court to exercise its discretionary jurisdiction to review the Tenth Circuit's interpretation of that law. Even

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[3] Rimmer has never asserted that he filed a financing statement to perfect his purchase. Therefore, the only issue on remand is whether Rimmer was excused from perfecting his interest in Poll's accounts by the *de minimis* exception to the filing requirement set out in Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).

if this Court were otherwise inclined to exercise its jurisdiction, review is premature because the Tenth Circuit has remanded the case to the bankruptcy court to make findings which are necessary to determine the proper application of Oklahoma law.

Contrary to Rimmer's arguments, the decisions of the Eight Circuit in *Garrott & Sons v. Union Planters National Bank (In re N.S. Garrott & Sons)*, 772 F.2d 462 (8th Cir. 1985), and the Ninth Circuit in *Dewhirst v. Citibank (In re Contractors Equipment Supply Co.)*, 861 F.2d 241 (9th Cir. 1988), are not in conflict with the decision of the Tenth Circuit in this case. But even if the courts had reached different conclusions – which they did not – no conflict between the circuits would exist because each court interpreted a different state's law. No conflict between the circuits exists when the allegedly conflicting decisions are based on the laws of different states.

ARGUMENT

I. THIS COURT SHOULD NOT EXERCISE ITS DISCRETIONARY JURISDICTION TO REVIEW THE TENTH CIRCUIT'S INTERPRETATION OF OKLAHOMA LAW.

Rimmer's petition for certiorari should be denied because the only issue raised by the petition is whether the Tenth Circuit correctly interpreted Oklahoma law. This Court has repeatedly held that it will not grant certiorari to review a lower federal court's interpretation of state law. *See, e.g., Planned Parenthood v. Casey*, ___ U.S. ___, 112 S. Ct. 2791, 2822, 120 L. Ed. 2d 674 (1992); *Butner*

v. United States, 440 U.S. 48, 57-58 (1979); *Bishop v. Wood*, 426 U.S. 341, 345-46 (1976).

As the basis for requesting Supreme Court review, Rimmer argues that the Tenth Circuit's decision violates § 541(d) of the Bankruptcy Code by including in Poll's bankruptcy estate an equitable interest in the accounts purchased by Rimmer which Rimmer asserts did not exist when Poll filed its bankruptcy petition. But in holding that Poll's bankruptcy estate included an equitable interest in those accounts, the Tenth Circuit merely held that the interest existed under Oklahoma law at the time of Poll's bankruptcy. Therefore, the Tenth Circuit did not include an interest in Poll's bankruptcy estate which Poll did not already possess under state law. Regardless of whether the Tenth Circuit correctly interpreted Oklahoma law, the Tenth Circuit's interpretation of that law is not an appropriate subject for review by this Court.

A. The Tenth Circuit Properly Looked to Oklahoma Law and Correctly Determined that Oklahoma Law Gave Poll an Equitable Interest in the Accounts.

Section 541(a)(1) of the Bankruptcy Code expansively defines the property of a debtor's estate to include "all legal or equitable interests of the debtor in property as of the commencement of the case." In *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 203 (1983), this Court held that § 541 of the Bankruptcy Code was not intended to limit the property interests which were included in a debtor's bankruptcy estate, and held that the debtor's bankruptcy estate included all property interests which

the debtor had under state law. Therefore, a bankruptcy court must look to state law to determine whether a debtor has a legal or equitable interest in any particular property at the commencement of the bankruptcy case. *See Butner v. United States*, 440 U.S. at 54-55. If it finds that the debtor has an interest under state law, that interest is automatically included in the debtor's estate.

When the Tenth Circuit considered whether Poll had an interest in the accounts purportedly purchased by Rimmer, it rightly looked to Oklahoma law as being dispositive of the nature and extent of Poll's interest. Section 9-102(1)(b) of the Oklahoma Commercial Code, as evidenced by the official comments accompanying that section, makes Article 9 of the Code expressly applicable to a sale of accounts even where the sale was a "true" sale and was not intended as a security device. The Tenth Circuit therefore held that the Bankruptcy Court had wrongly concluded that Article 9 applied only to grants of security.

Applying Article 9, the Tenth Circuit held that, even in the case of a true sale, Okla. Stat. Ann. tit. 12A, § 9-301(1)(b) gives a seller of an account an equitable interest in the account when the purchaser of the account fails to perfect its interest as required by Article 9. Because it was not clear from the record whether Rimmer was required to perfect his interest in Poll's accounts by filing a financing statement, the Tenth Circuit remanded the case to the Bankruptcy Court to determine whether Rimmer had not acquired a significant part of Poll's accounts and therefore was excused from filing by Okla. Stat. Ann. tit. 12A, § 9-302(1)(e).

The Tenth Circuit's analysis is undeniably correct. Its holding that Article 9 of the Oklahoma Commercial Code applies to true sales of accounts and that the seller retains an equitable interest in the sold accounts if the purchaser does not properly perfect his purchase is in accord with the decisions of other courts which have considered the issue under the similar law of other states. *See Major's Furniture Mart, Inc. v. Castle Credit Corp.*, 602 F.2d 538, 542 (3d Cir. 1979) (applying Pennsylvania law); *United States v. Trigg*, 465 F.2d 1264, 1268-69 (8th Cir. 1972), *cert. denied*, 410 U.S. 909 (1973) (applying Arkansas law); *In re Flowers*, 78 B.R. 774, 776 (Bankr. D.S.C. 1986) (applying South Carolina law); *Daly v. Shrimplin*, 610 P.2d 397, 400-01 (Wyo. 1980) (applying Wyoming law).

Under § 541 of the Bankruptcy Code and this Court's holding in *Whiting Pools, supra*, it is not up to the federal courts to exclude property interests which exist under state law from a debtor's bankruptcy estate. If Oklahoma statutory law creates interests which have an adverse impact in other areas, it is up to the Oklahoma legislature, not the federal courts, to decide whether Oklahoma law should be changed.

B. The Tenth Circuit Decision Is Not in Conflict with the Holding of the Eighth Circuit in *Garrott & Sons.*

Rimmer argues that the Tenth Circuit's decision conflicts with the holding of the Eighth Circuit in *Garrott & Sons v. Union Planters National Bank (In re N.S. Garrott & Sons)*, 772 F.2d 462 (8th Cir. 1985), on the issue of whether § 541(a)(1) and (d) of the Bankruptcy Code allows an

equitable interest in property to be included in the bankruptcy estate if the debtor did not own the interest at the time the bankruptcy petition was filed. Rimmer's argument overlooks the essential holding of both the Tenth Circuit and the Eighth Circuit that state law determines whether an equitable interest exists at the time the debtor files its bankruptcy petition.

Relying in part on *Butner v. United States, supra,* the Eighth Circuit held that the question of whether a debtor retained an interest in an escrow account was determined by the state law of Arkansas and held that, because Arkansas law required the imposition of a constructive trust on the escrow account, only that portion of the escrow account which was not required to satisfy the constructive trust constituted property of the estate. *Garrott & Sons,* 772 F.2d at 467. This holding is not in conflict with the holding of the Tenth Circuit at all. In both cases, the courts carefully looked to state law to determine the nature and extent of the debtor's interest in the property in question and held that the debtor's bankruptcy estate included whatever equitable interests existed under state law.

II. RIMMER'S PETITION IS PREMATURE.

A. Rimmer Wants This Court To Review a Case that the Tenth Circuit Did Not Decide.

Rimmer does not seriously dispute that Article 9 of the Oklahoma Commercial Code is applicable to true sales of accounts, or that his unperfected interest in Poll's accounts would be subordinate to the interest of Poll's bankruptcy estate if he was required by the Oklahoma

Commercial Code to perfect his interest by filing a financing statement. Rather, Rimmer's real concern is that, because Article 9 of the Oklahoma Commercial Code classifies the interest of a purchaser of accounts as a "security interest," and because this Court held in *Whiting Pools, supra,* that property subject to a security interest is included in a debtor's bankruptcy estate, the Tenth Circuit might hold that Poll had an equitable interest in the accounts acquired by Rimmer even if he was excused from perfecting his purchase by the § 9-302(1)(e) *de minimis* exception.[4] This issue was not decided by the Tenth Circuit and is not before this Court.

The Tenth Circuit did not hold that an account sold by a debtor prior to bankruptcy is always property of the

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[4] This is also the concern of the asset-backed financing industry which Rimmer uses in an attempt to give the Tenth Circuit decision an aura of national importance. In his article cited in Rimmer's petition, Professor Schwarcz acknowledges that the asset-backed financing industry understands that Article 9 of the Uniform Commercial Code applies to true sales of accounts and requires the purchaser to perfect its purchase by filing a financing statement. Schwarcz, *'Octagon Gas' Ruling Creates Turmoil for Commercial and Asset-Backed Finance,* 210 N.Y.L.J., No. 24 (August 4, 1993). Rather, Schwarcz and the other commentators cited by Rimmer are concerned that the characterization of the interest of a purchaser of accounts under the Uniform Commercial Code as a "security interest" may mean that accounts sold to a properly perfected purchaser are still part of the seller's bankruptcy estate. As noted in the text following this footnote, the Tenth Circuit did not hold that accounts sold to a properly perfected purchaser are nonetheless part of the seller's bankruptcy estate. Even if it had so held based on Oklahoma law, it would not be within the province of the federal courts to revise Oklahoma law to remove perceived impediments to asset-backed financing.

seller's bankruptcy estate. In fact, in response to the claim by the dissent in the case that the majority's holding had just that effect, the Court explained:

> The dissent implies that the application of Article 9 to the facts of this case automatically divests Rimmer of his interest. We do not agree that such a result is mandated. For example, upon remand, the court may determine that Rimmer retains his interest because no U.C.C. filing was required under Okla. Stat. Ann. tit. 12A, [§ 9-302(1)(e)] (no filing required if account assignment does not transfer a significant part of outstanding accounts of assignor).

Pet. App. 17a n.10.

Far from holding that accounts sold to a perfected purchaser are nonetheless part of the seller's bankruptcy estate, the Tenth Circuit remanded the case to the bankruptcy court to determine whether Rimmer was required to perfect his purchase by filing a financing statement and if he was required to file a financing statement, whether he did so.[5] That remand would have served no purpose if the accounts were part of Poll's estate in any event.

Because the issue of whether accounts sold to a perfected purchaser are property of the seller's bankruptcy estate was not decided by the Tenth Circuit, review by this Court is both premature and inappropriate. At a minimum, this Court should wait until the bankruptcy

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[5] Although the Tenth Circuit did not find the record on whether Rimmer filed a financing statement clear, Rimmer has never asserted that he filed one.

court determines whether Rimmer was required to perfect his purchase under Oklahoma law. If Rimmer was required to perfect, his interest is unquestionably subordinate to the interest of Poll's bankruptcy estate and there will be nothing for this Court to review.

B. Rimmer Waived Any Right To Contest the Transfer to Octagon.

The Tenth Circuit also remanded this case to the Bankruptcy Court to determine whether Rimmer is estopped from asserting his claim to the property at issue in this case. Pet. App. 17a. The Poll plan of reorganization expressly provided for the transfer of the accounts claimed by Rimmer to Octagon "free and clear of all liens, claims, interests and encumbrances." Pet. App. 3a. Rimmer voted to accept this plan and did not appeal the order confirming it.

In *Stoll v. Gottlieb*, 305 U.S. 165, 172 (1938), this Court held that the only way a party in interest could preserve its claim that a plan of reorganization contained terms which were contrary to law was to object to confirmation and appeal the confirmation order. The Bankruptcy Court must now decide whether Rimmer may collaterally attack the order confirming a plan to which he not only failed to object but which he actually voted to accept. This Court should therefore not reach the issues in this case until after the Bankruptcy Court acts upon remand.

III. THE TENTH CIRCUIT'S DECISION IS NOT IN CONFLICT WITH THE NINTH CIRCUIT'S DECISION IN *DEWHIRST V. CITIBANK*.

Contrary to Rimmer's contention, a mature conflict between the circuits does not exist. To the extent that the Tenth Circuit's decision in this case and the Ninth Circuit's decision in *Dewhirst v. Citibank (In re Contractors Equipment Supply Co.)*, 861 F.2d 241 (9th Cir. 1988), address the same issues, the two decisions are in accord. The Ninth Circuit recognized that Article 9 of the Arizona Commercial Code, like Article 9 of the Oklahoma Commercial Code, applies to sales of accounts which are not intended for security. *Id.* at 245.

Although the two courts agree as to the applicability of Article 9 in each state to true sales of accounts, the issues before the Courts were otherwise entirely different. The issue decided by the Tenth Circuit was whether, under Oklahoma law, accounts sold prepetition were part of the seller's bankruptcy estate when the purchaser failed to perfect. The issue presented in *Dewhirst* was whether, by directing an account debtor to make payment directly to it, the holder of a security interest in an account so completed its foreclosure of its security interest in the account as to terminate the debtor's equitable interest in the account under Arizona law. The Ninth Circuit held that, under the facts of the case before it, the notice to the account debtor did not transfer title to the account to the secured party, and therefore, the account was still property of the debtor's estate. *Id.*

No conflict between circuits would exist even if the courts had considered the same legal issue. The Ninth

Circuit's decision was based wholly on its interpretation of Arizona statutory law. The Tenth Circuit's decision in this case was based wholly on its interpretation of Oklahoma statutory law. A conflict between the circuits does not exist if the allegedly conflicting decisions deal with different provisions of law or with similar provisions of the law of different states.

A threshold requirement for the existence of a conflict between circuits is that the circuits address the same issue and render inconsistent decisions. Because the issue addressed by the Ninth Circuit in *Dewhirst* is entirely different than the issue addressed by the Tenth Circuit in this case and because the two courts applied the law of different states, no conflict between the circuits exists.

CONCLUSION

For the reasons stated above, Rimmer's Petition for a Writ of Certiorari should be denied.

DATED this 5th day of November, 1993.

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APPENDIX

STATUTES INVOLVED

This case involves the following provisions of the Oklahoma Statutes Annotated title 12A:

§ 1-201. General Definitions

Subject to additional definitions contained in the subsequent articles of the Uniform Commercial Code which are applicable to specific articles or parts thereof, and unless the context otherwise requires, in the Uniform Commercial Code:

. . .

(37) (a) "Security interest" means an interest in personal property or fixtures which secures payment or performance of an obligation. The retention or reservation of title by a seller of goods regardless of shipment or delivery to the buyer (Section 2-401 of this title) is limited in effect to a reservation of a "security interest". The term also includes any interest of a buyer of accounts or chattel paper which is subject to Article 9 of this title. The special property interest of a buyer of goods on identification of such goods to a contract for sale under Section 2-401 of this title is not a "security interest", but a buyer may also acquire a "security interest" by complying with the provisions of Article 9 of this title. Unless a consignment is intended as security, reservation of title thereunder is not a "security interest" but a consignment is in any event subject to the provisions on consignment sales (Section 2-326 of this title).

(b) Whether a transaction creates a lease or security interest is determined by the facts of

each case; however, a transaction creates a security interest if the consideration the lessee is to pay the lessor for the right to possession and use of the goods is an obligation for the term of the lease not subject to termination by the lessee, and:

(i) the original term of the lease is equal to or greater than the remaining economic life of the goods,

(ii) the lessee is bound to renew the lease for the remaining economic life of the goods or is bound to become the owner of the goods,

(iii) the lessee has an option to renew the lease for the remaining economic life of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement, or

(iv) the lessee has an option to become the owner of the goods for no additional consideration or nominal additional consideration upon compliance with the lease agreement.

(c) A transaction does not create a security interest merely because it provides that:

(i) the present value of the consideration the lessee is obligated to pay the lessor for the right to possession and use of the goods is substantially equal to or is greater than the fair market value of the goods at the time the lease is entered into,

(ii) the lessee assumes risk of loss of the goods, or agrees to pay taxes, insurance,

filing, recording, or registration fees, or service or maintenance costs with respect to the goods,

(iii) the lessee has an option to renew the lease or to become the owner of the goods,

(iv) the lessee has an option to renew the lease for a fixed rent that is equal to or greater than the reasonably predictable fair market rent for the use of the goods for the term of the renewal at the time the option is to be performed, or

(v) the lessee has an option to become the owner of the goods for a fixed price that is equal to or greater than the reasonably predictable fair market value of the goods at the time the option is to be performed.

(d) For purposes of this subsection:

(i) additional consideration is not nominal if:

(A) when the option to renew the lease is granted to the lessee the rent is stated to be the fair market rent for the use of the goods for the term of the renewal determined at the time the option is to be performed, or

(B) when the option to become the owner of the goods is granted to the lessee the price is stated to be the fair market value of the goods determined at the time the option is to be performed. Additional consideration is nominal if it is less than the lessee's

reasonably predictable cost of performing under the lease agreement if the option is not exercised;

(ii) "reasonably predictable" and "remaining economic life of the goods" are to be determined with reference to the facts and circumstances at the time the transaction is entered into; and

(iii) "present value" means the amount as of a date certain of one or more sums payable in the future, discounted to the date certain. The discount is determined by the interest rate specified by the parties if the rate is not manifestly unreasonable at the time the transaction is entered into; otherwise, the discount is determined by a commercially reasonable rate that takes into account the facts and circumstances of each case at the time the transaction was entered into.

. . .

§ 9-102. Policy and Subject Matter of Article

(1) Except as otherwise provided in Section 9-104 on excluded transactions, this article applies:

. . .

(b) to any sale of accounts or chattel paper.

. . .

§ 9-106. Definitions: "Account"; "General Intangibles"

"Account" means any right to payment for goods sold or leased or for services rendered which is not evidenced by an instrument or chattel paper, whether or not it has been earned by performance.

"General intangibles" means any personal property, including things in action, other than goods, accounts, chattel paper, documents, instruments and money. All rights to payment earned or unearned under a charter or other contract involving the use or hire of a vessel and all rights incident to the charter or contract are accounts.

§ 9-301. Persons Who Take Priority Over Unperfected Security Interests; Right of "Lien Creditor".

(1) Except as otherwise provided in subsection (2) of this section, an unperfected security interest is subordinate to the rights of:

. . .

(b) a person who becomes a lien creditor before the security interest is perfected;

. . .

(3) A "lien creditor" means a creditor who has acquired a lien on the property involved by attachment, levy or the like and includes an assignee for benefit of creditors from the time of assignment, and a trustee in bankruptcy from the date of the filing of the petition or a receiver in equity from the time of appointment.

§ 9-302. When Filing Is Required to Perfect Security Interest – Security Interests to Which Filing Provisions of This Article Do Not Apply

(1) A financing statement must be filed to perfect all security interests except the following:

. . .

(e) An assignment of accounts which does not transfer, alone or in conjunction

with other assignments to the same assignee, a significant part of the outstanding accounts of the assignor; or

. . .